NO. 89-1312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROGER MICHAEL AMES,
Petitioner

v.

R. E. AMES AND R. G. AMES,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts a cause of action for conversion arising under Texas common law on account of the actions of a plan fiduciary after termination of an ERISA-governed plan and distribution of benefits.

2. Whether the federal courts have exclusive jurisdiction of a cause of action brought against the trustee of an ERISA plan who committed acts of conversion of benefits distributed out of the plan following its termination.

LIST OF PARTIES IN RULE 28.1 LIST

The following listed parties have an interest in the outcome of this case:

Petitioner: Roger Michael Ames

Respondents: R. E. Ames and R. G. Ames

An additional party to the suit below is Heights State Bank. Heights State Bank is not a party to the Petition for Writ of Certiorari. Heights State Bank, now operating under the name NBC Bank, Houston - N.A., will hereinafter be referred to as Heights State Bank.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

To The Honorable Supreme Court of the United States:

GROUNDS FOR DENIAL OF CERTIORARI

The Application for Certiorari should be denied. The decision of the Supreme Court of the State of Texas is not in conflict with the decision of another state court of last resort, a federal Court of Appeals, or this Court. The decision of the Texas Supreme Court is in keeping with the accepted and usual course of judicial proceedings

and does not call for this Court's exercise of its power of supervision. This case does not involve an important question of Federal law.

OPINIONS BELOW

After trial of this case to a jury, and pursuant to the findings of fact of the jury, the 58th Judicial District Court of Jefferson County, Texas entered judgment in favor of Respondents against Petitioner on April 29, 1987. The Beaumont Court of Appeals affirmed the trial court's judgment against Petitioner on August 25, 1988. The Opinion of the Beaumont Court of Appeals is reported at 757 S.W.2d 469, and a copy is attached hereto in Appendix A. The Texas Supreme Court affirmed the judgment of the Court of Appeals with respect to Petitioner on July 12, 1989. The Opinion of the Texas Supreme Court is reported at 776 S.W.2d 154, and a copy of that opinion, together with the concurring and dissenting opinion, is attached hereto in Appendix B.

STATEMENT OF THE CASE

Respondents were participants in a profit sharing plan and trust ("Plan") set up for the benefit of the employees of Threaded Steel Products Company ("Threaded Steel"). At all periods of time pertinent to this litigation, Southwestern Life Insurance Company ("Southwestern Life"), was the administrator and Petitioner was the sole trustee of the Plan. The Plan was a qualified retirement plan governed by the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Respondents and Petitioner were brothers and shareholders of Threaded Steel. Petitioner was Chairman and Chief Executive Officer of Threaded Steel at all pertinent periods of time.

In November, 1982, Threaded Steel terminated the Plan. Shortly thereafter, Southwestern Life sent Petitioner a check in the amount of $424,888.35, which represented all of the benefits of participants held in the trust fund set up for the Plan. Petitioner deposited these funds at Heights State Bank in the following manner:

1. $156,500 in a certificate of deposit set up in the name of the Plan;

2. $13,741.63 in a checking account set up in the name of the Plan; and

3. $254,646.72 in the checking account styled "R. E., R. G., R. L.,[1] and R. M. Ames", showing "R. M. Ames, Trustee" as sole signatory.

Without Respondents' knowledge or consent, Petitioner drew a check payable to InterFirst Bank Beaumont in the amount of $254,000 against the $254,646.72 checking accout. The legend on the check stated "C. D. for R. E., R. G., R. M., R. L. portion of TSP [Threaded Steel Products] Profit Sharing Plan." Petitioner distributed the funds in the certificate of deposit and checking account set up in the name of the Plan to the other employee-participants of the Plan. After Petitioner made the $254,000 transfer to InterFirst Bank Beaumont, he had $157,895.02 of that amount transferred by wire back to Heights State Bank. The disposition of the remaining portion of the $254,000 is unknown, since at trial Petitioner refused to answer questions about such disposition, asserting his constitutional privilege against self-incrimina-

1. R. L. Ames, another brother of Petitioner and Respondents, was not a party to this litigation.

tion. Heights State Bank, for reasons unexplained in the record, loaned Threaded Steel an amount sufficient that, when added to the $157,895.02, enabled Threaded Steel to purchase a certificate of deposit in the amount of $254,000 (the original amount of profit sharing funds transferred out of the trust account). Petitioner, acting without the knowledge or consent of Respondents, pledged this certificate to Heights State Bank as collateral for various loans made by the Bank to Threaded Steel. Subsequently, Threaded Steel failed to repay the loans when they came due and the Bank offset the certificate against the amounts owed to it, after Respondents filed suit against Petitioner and served a copy of the pleading on the Bank.

Respondents sued Petitioner and Heights State Bank in Texas state district court alleging conversion of their benefits that had been distributed out of the Plan to Petitioner. The jury found that Petitioner had committed a conversion of Respondents' benefits but failed to find that the certificate in question obtained any monies belonging to Respondents. Pursuant to these findings, the state district court entered judgment in favor of Respondents against Petitioner but rendered a take-nothing judgment against Heights State Bank. The Ninth Court of Appeals, in Beaumont, Texas, affirmed the judgment against Petitioner but reversed and remanded the take-nothing judgment against Heights State Bank to the district court for a new trial. The Texas Supreme Court affirmed the holding of the Court of Appeals on both issues.

ARGUMENT AND AUTHORITIES

I. The ruling of the Texas Supreme Court is correct because ERISA does not preempt a state common law cause of action arising out of acts of a trustee after termination of an ERISA-governed plan and distribution of benefits.

Petitioner argues that this Court should grant writ of certiorari because Respondents' common law conversion claim against Petitioner has been preempted by ERISA. According to Petitioner's argument, the acts of which Respondents complain, if true, constitute a breach of the fiduciary duties owed by Petitioner to Respondents under 29 U.S.C. §§ 1104-1106. Thus, Petitioner argues, Respondents' exclusive remedy against Petitioner is a lawsuit for violation of ERISA in the federal courts.

The statute governing preemption, 29 U.S.C. § 1144(a), provides in pertinent part as follows:

> "Except as provided in subsection (b) of this section, the provisions of this title and Title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 4(a) [29 U.S.C.S. § 1003(a)] and not exempt under Section 4(b) [29 U.S.C.S. § 1003(b)]."

29 U.S.C.S. § 1144(a) (Law. Coop. 1982).

The rationale for federal preemption of state remedies and causes of action governed by ERISA is to ensure that trustees and plans will not be subject to the threat of conflicting and inconsistent federal and state regulations. *Hoffman v .Chandler,* 431 So.2d 499 (Ala. 1983); *Smith v. Crowder, Jr. Co.,* 280 Pa. Super. 626, 421 A.2d

1107 (1980). Thus, the controlling issue in each case is whether the claim "relates to" the *continuing* administration of the Plan or enforcement of the participants' rights under the statute. Applying this test, courts have held that claims which do not concern the substance or regulation of a plan or do not conflict with the purposes of ERISA are not preempted by the statute. *Shaw v. Westinghouse Electric Corp.,* 276 Pa. Super. 220, 419 A.2d 175 (1980). Similarly, an action brought in state court to recover benefits due under the terms of a plan is not preempted by ERISA. *Lukus v. Westinghouse Electric Corp.,* 276 Pa. Super. 232, 419 A.2d 431 (1980). On the other hand, courts have uniformly held that ERISA preempts all state laws which regulate the content or administration of a plan, such as funding, vesting, record-keeping, prohibited transactions, and a beneficiary's right to information. *Delta Air Lines, Inc. v .Kramarsky,* 666 F.2d 21, 25 (2nd Cir. 1981) *mod.* 463 U.S. 85 (1983); *Standard Oil of California v. Agsalud,* 633 F.2d 760, 764 (9th Cir. 1980) *aff'd.* 454 U.S. 801 (1981).

Relying on this authority, the Texas Supreme Court held that, based on the undisputed evidence in the record, Respondents sought to recover benefits due to them under the Plan after its termination. Significantly, the facts supporting the claim for conversion arose *after* (1) the Plan had been terminated; (2) Petitioner had received a distribution of all Plan assets from the Plan Administrator; (3) Petitioner had distributed all benefits to Plan participants except those belonging to Ames family members; and (4) Petitioner distributed Ames family benefits to a trust account set up at Heights State Bank. It is also significant that neither the checking account nor the certificates of deposit bearing Respondents' benefits were

set up in the name of the Plan, but were common law trust accounts set up by Petitioner as trustee for himself and Respondents.

Based upon these facts, which are undisputed, the Texas Supreme Court correctly held that Respondents' claims were for recovery of benefits under the terms of the terminated Plan and did not involve the violation of any fiduciary duty created under ERISA or the regulation of Plan administration. *Ames v. Ames,* 776 S.W.2d at 157-58. Since the Plan had been terminated and benefits distributed, the Court determined that it was not faced with any question of interpreting the terms or conditions of the Plan or of Plan administration. *Id.* Thus, the Court correctly held that Respondents' conversion claim against Petitioner did not "relate to" the Plan within the meaning of 29 U.S.C. § 1144(a).

Petitioner asserts that the acts of Petitioner that gave rise to Respondents' cause of action constituted a breach of Petitioner's fiduciary duties under 29 U.S.C. §§ 1104-1106. Petitioner has not cited this Court to a single case supporting the applicability of these statutes to similar facts. Moreover, Respondents have never alleged violations of the fiduciary duties created under Sections 1104-1106.[2] Furthermore, even if Petitioner's conduct may be characterized theoretically as a violation of one or more of those statutes, Petitioner has failed to cite any authority to this Court for his proposition that ERISA applies to

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2. Section 1104 establishes the standard of care applicable to a fiduciary *administrating a plan.* Section 1105 concerns the responsibilities of co-fiduciaries *of a plan.* Section 1106 sets forth the "prohibited transactions rule" pertaining to the fiduciary's conflicts of interest when handling with *assets of the plan.*

the acts of a plan fiduciary arising wholly after termination of the Plan and distribution of benefits.[3]

While this Court has not directly considered the continuing applicability of ERISA to post-termination conduct, the United States Courts of Appeal for the Fourth and Fifth Circuits have held that ERISA does not apply to a claim arising under similar facts. In *Henry v. Beaumont Iron & Metal Corp.*, 866 F.2d 1418 (5th Cir. 1989), *cert. den'd.* ____U.S.____, 106 U.S.L.W. 593 (1989), the Fifth Circuit affirmed a motion for summary judgment entered by a United States District Court against a participant suing the trustee and administrator of a qualified plan for breach of fiduciary duties under ERISA relating solely to alleged acts of the plan fiduciaries after termination of the plan and distribution of benefits. A copy of the Fifth Circuit's unpublished *per curiam* opinion is attached hereto in Appendix C. In *Tenneco, Inc. v. First Virginia Bank of Tidewater,* 698 F.2d 688, 690-91 (4th Cir. 1983), the United States Court of Appeals for the Fourth Circuit affirmed a U. S. District Court's denial of relief to the plaintiff under ERISA on account of a garnishment of the plaintiff's funds after they had been distributed out of the plan. In both cases, the courts

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3. Petitioner's reliance on *Mead v. Tilley,* ____U.S.____, 109 S.Ct. 2156 (1989), *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987), and *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983) is misplaced, since none of those cases involve post-termination conduct of a plan trustee. Similarly, *Amalgamated Clothing & Textile Workers v. Murdock,* 861 F.2d 1406 (9th Cir. 1988) is distinguishable since in that case the claimants alleged that the plan fiduciaries breached duties *to the plan* in connection with their decision to terminate the plan and permit a reversion of plan surplus to the employer. Finally, Petitioner's reliance on *District 65, UAW v. Harper & Row Publishers, Inc.,* 696 F.Supp. 29 (S.D.N.Y. 1988) is also erroneous since that case involved the application of ERISA to the computation of plan distributions *during the process of termination,* which is clearly an issue of plan regulation.

refused to apply ERISA to funds which had been distributed and were no longer assets of a plan when the cause of action arose.

II. The Texas Supreme Court correctly held that the state courts exercise concurrent jurisdiction over a claim for benefits distributed out of a terminated ERISA plan.

Petitioner further contends that, under the provisions of ERISA, the Texas state courts lack subject matter jurisdiction. Petitioner argues that, since Respondents' claim against Petitioner is for breach of fiduciary duties, rather than for denial of benefits, the federal courts have exclusive jurisdiction over such claim.

Congress has conferred subject matter jurisdiction over controversies involving qualified retirement plans pursuant to 29 U.S.C. § 1132(e)(1), as follows:

> "Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this Section."

29 U.S.C.S. § 1132(e)(1) (Law. Coop. 1982).

29 U.S.C. § 1132(a)(1)(B) provides that a civil action may be brought by a participant or beneficiary:

> "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the

> plan, or to clarify his rights to future benefits under the terms of the plan."

29 U.S.C.S. § 1132(a)(1)(B) (Law. Coop. 1982).

In this case, the Texas Supreme Court held that Respondents' cause of action was for recovery of benefits owed to them under the terms of the terminated plan. *Ames,* 776 S.W.2d at 157. The Court found that Respondents' cause of action arose out of the failure or refusal of the trustee of the terminated plan to convey benefits, not the violation of a fiduciary duty created by ERISA in the continuing administration of the Plan. *Id.* Thus, the state district court properly exercised jurisdiction over Respondents' claim.

The decision of the Texas Supreme Court is clearly correct and Certiorari should be denied on this issue. It is undisputed that, in Respondents' operative pleadings below, Respondents stated a claim for the recovery of benefits which Petitioner had wrongfully deposited into an account at Heights State Bank and pledged to the Bank as security for loans of Threaded Steel. The state courts have concurrent jurisdiction over cases instituted for collection of benefits from a plan trustee, for accounting, and for breach of contract or common law fraud arising out of the recovery of EIRSA plan benefits. See Response to Application for Writ of Error of Roger Michael Ames filed by Respondents with the Texas Supreme Court, pp. 18-20.

Petitioner engages in a game of semantics by recharacterizing this case as one arising out of an alleged breach of fiduciary duties. The purpose behind Petitioner's attempt to replead Respondents' cause of action is to show the court that this case is factually similar to deci-

sions such as the *Duffy v. Brannen,* 529 A.2d 643 (Vt. 1987), in which the courts have held that the federal courts have exclusive jurisdiction over a claim for breach of fiduciary duties under ERISA. This Court need not determine whether Respondents' claim was, in fact, a denial of benefits or a breach of fiduciary duty. The cases cited by Petitioner on this issue are factually distinguishable for two reasons: (1) none of those decisions involve wrongful acts of the plan fiduciary committed after the termination of the plan, and (2) in this case Respondents have not alleged facts supporting a cause of action for breach of fiduciary duties under 29 U.S.C. §§ 1104-1106.

III. The decision of the Texas Supreme Court is consistent with the Congressional intent of ERISA, creates no conflict with existing federal statutes or the decisions of the federal courts or of other states, and creates no important question of federal law.

Finally, Petitioner asserts that this Court should grant its Petition for Writ of Certiorari because the ruling of the Texas Supreme Court undermines the intent of Congress to establish uniform fiduciary standards in ERISA and creates conflicting standards and remedies for breach of fiduciary duties. For the reasons stated below, such assertion is a gross exaggeration of the likely effect of the Texas Supreme Court's ruling.

First, it should be noted that this case posed an unusual and narrow issue of fact for the Texas Supreme Court. *Ames,* 776 S.W.2d at 157. The Court determined that ERISA did not apply to a conversion of funds traceable to a plan after its termination and the distribution of its assets. The Court did not address any substantive issues

concerning the regulation of the plan or the fiduciary duties of the plan trustee. No important federal question arises under the undisputed facts of the case. This case is really no different from a case brought in connection with a creditor's seizure of funds which, though traceable to an ERISA plan, are on deposit in an account established in a name other than that of the plan. In such a case, ERISA clearly does not apply. See, *Henry* (Appendix C), and *Tenneco,* 698 F.2d at 690-91. Thus, this is not a case of a state court determining an important question of federal law.

Second, the decision of the Texas Supreme Court is correct because the Congressional intent in enacting ERISA was to provide a full range of legal and equitable enforcement remedies available in both federal and state courts. *Laborers Fringe Benefits Funds-Detroit and Vicinity v. Northwest Concrete and Construction, Inc.,* 640 F.2d 1350 (6th Cir. 1981). In order that the enforcement provisions of ERISA be fully effective, the statute must be liberally construed:

> "to provide both the Secretary [of Labor] and the participants and beneficiaries with broad remedies for redressing or preventing violations of the Act."

H.R. Rep. No. 93-533, 93rd Cong., 2nd Sess. 17 (1974).

In enacting ERISA the intent of Congress was:

> "to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdiction and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants."

Id.

Allowing Respondents to maintain their common law cause of action in the Texas courts under the facts of this case furthers this express Congressional purpose. To adopt Petitioner's position, on the contrary, would effectively *narrow* the remedies available to plan participants under circumstances in which federal regulation was clearly unintended by Congress.

Third, the State of Texas has a valid interest in protecting the interest of its citizens in their property. This valid state interest is preserved by allowing them to maintain a common law claim for acts occurring after the termination of the ERISA-governed plan. Petitioner, on the other hand, has not shown how the enforcement of Respondents' rights in state court will impair ERISA's superintendence of the field of employee benefit plans. *Florida Avocado Growers v. Paul,* 373 U.S. 132 (1962). Rather, Petitioner merely attempts to use his position as Trustee of the terminated Plan as a shield against liability for his own tortious acts commited under circumstances wholly unrelated to the administration of the Plan or the provisions of ERISA.

This Court should not grant the Petition for Writ of Certiorari. A reversal of the decisions of the courts of Texas would frustrate the remedial intent of Congress and would not advance the stated purpose of Federal preemption and exclusive Federal jurisdiction over ERISA plans. The sole effect of such a reversal would be to deprive Respondents of their state common law remedies for conversion under facts which do not give rise to any federal remedies under ERISA.

CONCLUSION

The Supreme Court of the State of Texas correctly affirmed the judgment of the lower state courts in favor of Respondents and against Petitioner, and Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

NO. 09-87-125 CV

ROGER MICHAEL AMES, ET AL,
Appellant

v.

R. E. AMES AND R. G. AMES, ET AL,
Appellees

Appealed From The 58th Judicial District Court
Jefferson County, Texas

(Filed August 25, 1988)

OPINION

In the trial court R. E. Ames and R. G. Ames were plaintiffs and the Heights State Bank, now known as the NBC Bank, Houston-N.A., was a defendant. The litigation involved the claims of R. E. Ames and R. G. Ames, who were participants in the Threaded Steel Products Company employees profit sharing plan, hereafter "the plan". The litigation was also brought by the plaintiffs against Roger Michael "Mike" Ames, the trustee of the profit sharing plan, based on his failure to distribute sums of money owing to the plaintiffs under the plan, and for his wrongful conversion of those sums of money to his own uses.

The proceeding was brought against the Heights State Bank to recover certain funds of the plan that had been deposited in the bank evidenced by a certain certificate

of deposit placed with the bank. The funds in the certificate of deposit originated in the profit sharing plan which belonged to the plaintiffs but were wrongfully pledged by Mike Ames as trustee as collateral for commercial loans made to the Threaded Steel Products Company.

In a juried proceeding the district court signed and rendered a judgment against Mike Ames for conversions of the sums due the plaintiffs in the sum of $212,161.40 to R. E. Ames and a separate sum of $94,501.00 to R. G. Ames. The judgment awarded an additional $10,000.00 in punitive damages for tortious conversion committed by Mike Ames. However, the court below entered judgment that R. E. Ames and R. G. Ames take nothing against the Heights State Bank. The Appellants, plaintiffs below, have properly and timely perfected their appeal from the take nothing judgment entered on their claims against the Heights State Bank, hereinafter "State Bank".

The appeal involving State Bank is based on two points of error, the first being that the district court erred in denying the Appellants' Motion for Judgment Notwithstanding the Verdict as to the State Bank because the evidence herein established as a matter of law that the funds in the certain certificate of deposit were the profit sharing trust funds that actually belonged to R. E. Ames and R. G. Ames.

The second point of error argues that the district court erred in denying the Appellants' Motion for New Trial because of the jury's negative answer to a question whereby the jury failed to find that the funds on deposit in certificate No. 28793 were profit sharing trust funds belonging to the two plaintiffs, this failing to so find being against the great weight and preponderance of the evidence.

The General Background

R. E. "Eddy" Ames and R. G. Ames were both employees of Threaded Steel Products Company. Eddy Ames started working for the company in 1948. He began as a laborer. Threaded Steel was a family owned company. Later, Eddy joined the Air Force for four years. Afterwards he returned to Threaded Steel and remainded there until 1980, serving as an employee for thirty years. He rose to Chief Executive Officer and Chairman of the Board. R. E. "Eddy" Ames possessed an ownership interest in the company, owning approximately 20% of the stock. R. E. and R. G. Ames were, as employees, members of the profit sharing plan at Threaded Steel.

Steps were taken in 1983 to terminate and wind up the profit sharing plan. The first efforts made to set up such a profit sharing plan began around 1972. R. E. "Eddy" Ames did not withdraw his share of the plan because he was not sixty years old at the time he left Threaded Steel. After the plan was terminated he was told that Mike Ames, the plan trustee, had put the funds belonging to R. E. Ames and R. G. Ames in a certificate of deposit at the Heights State Bank in Houston.

Mike Ames, the sole trustee, never distributed or delivered any profit sharing benefits under the plan to either R. E. Ames or R. G. Ames even though he was asked for these funds on several occasions.

It is important to note that Mike Ames as trustee opened an account with the Heights Bank in November of 1982. Mike Ames told Mr. James E. Sheffield directly, who was a senior vice-president of the State bank, which Sheffield admitted, that he, Mike Ames, was the sole trustee of the profit sharing plan (also referred to as the

pension plan) for Threaded Steel Products Company's employees.

At that time a check from Southwestern Life Insurance Company in the amount of $424,000 and some-odd dollars was delivered and negotiated to the Heights State Bank. This was the check that Mike Ames used to open the initial account in Heights State Bank in November of 1982. After these funds were deposited with the Bank an amount of approximately $254,000.00 was deposited in a checking account styled R. E., R. G., and R. L. Ames, with Mike Ames as the sole signatory. This $254,-000.00 was part of the $424,000.00 from Southwestern Life Insurance Company. Out of this sum $156,500.00 was used to purchase a certificate of deposit in the name of Threaded Steel Products Company employees profit sharing - distribution account. An additional $13,741.00 was deposited into a checking account in the name of Threaded Steel Products Company employees profit-sharing distribution account.

The $13,741.00 was subsequently distributed to a group of employees entitled to the same. The $156,500.00 was subsequently deposited into the same account as the $13,741.00. The CD was in effect for about thirty days. It was renewed one time for another sixty days or so. The $156,500.00 was "rolled over" and put into a checking account. It was distributed to the employees.

Background narrative of events prior to November, 1982

In the fall of 1982 prior to the above-described transaction, Mike Ames contacted James E. Sheffiald, who was then acting as a senior vice-president in the commercial loan department.

In September of 1982 a loan application was made by Mike Ames in behalf of Threaded Steel Products Company in the amount of $180,000.00. The loan was declined and never thereafter approved. The lack of approval was due to the poor financial condition of Threaded Steel Products. It should be borne in mind, as we interpret Defendant's Exhibit No. 1, that Threaded Steel Products, according to its Financial Analysis, had a loss in 1977. This loss before taxes was about $87,000; in 1978, the loss was approximately $259,000; in 1979, about $70,000; in 1980, about $441,000; and, in 1981, about $228,000. Apparently, Threaded Steel had a profit during the first six months of 1979 but not the last six months. These financial facts showing heavy losses clearly prove that any funds used by Threaded Steel Products as collateral for commercial loans necessarily came from the profit-sharing plan, inasmuch as Threaded Steel Products only five months before was denied a loan due to its poor, distressed financial condition. The State Bank knew about these horrendous losses. They totalled $1,085,000.00. These losses are up to date through 1981. Then, very shortly, in the late summer of '82, Threaded Steel Products made its application for a loan in the amount of $180,000.00 with the State Bank.

$254,646.02 of the profit-sharing funds were transferred to InterFirst Bank in Beaumont. Later, $157,895.02 was transferred by wire back to the State Bank. A CD was bought in the name of R. M. "Mike" Ames, Trustee. The CD was in the total amount of $254,000.00. This sum represented the $157,895.02 plus an additional, approximate $100,000.00, which was borrowed from the bank, less about $3,000 deposited to a checking account. The CD in the amount of $254,000.00 was wrongfully

pledged as collateral for the commercial loans to Threaded Steel.

Later the Bank off-set this large CD to pay a commercial loan owed to the Bank. In his deposition Sheffield testified that he was aware that the funds from the large Southwestern Life Insurance Company check were initially deposited into the large CD which were then wired to InterFirst Bank in Beaumont and the funds were merely rewired back from InterFirst to State Bank through another Houston Bank.

Mike Ames, trustee, was served with certain Requests for Admissions. These Requests were challenged with the asserted privilege afforded to Mike Ames by the Fifth Amendment to the Constitution of the United States. Mike Ames, by a Motion in Limine, clearly set forth that he declined to answer questions which answers may tend to incriminate the person answering the questions; namely, Mike Ames.

Upon reviewing and analyzing the record, we conclude the district court fell into error in denying the plaintiffs-appellants' Motion for Judgment Notwithstanding the Verdict as to State Bank. The reason for finding error is that the evidence, we conclude, establishes and proves that the funds in the certificate of deposit No. 28793 were actually profit-sharing funds that belonged to the plaintiffs and the State Bank knew it. The record establishes that the State Bank added to the funds that had been "re-remitted" to it from the InterFirst Bank sufficient amounts to raise the total in the certificate of deposit to $254,000.00, the original amount of the profit-sharing CD.

The amount of this CD was equal to the account that had been previvously opened with funds directly from the Southwestern Life Insurance Company in the names of the plaintiffs, R. E. Ames and R. G. Ames. The State Bank converted this CD to pay off the loans and a letter of credit made by Threaded Steel.

The State Bank's officer knew or should have known that the funds on deposit in the CD were the profit-sharing trust funds. The record shows that these funds were, in fact, the two plaintiffs' profit-sharing trust funds and R. E. and R. G. Ames have established the identity and the tracing of these funds, we think, virtually as a matter of law. We decide that under the proper standards and criteria of review that the jury's verdict concerning these funds is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660 (1951); *Potter v. Garner,* 407 S.W.2d 537 (Tex. Civ. App.—Tyler, 1966, writ ref'd n.r.e.); *Pool v. Ford Motor Co.,* 715 S.W.2d 629 (Tex. 1986).

In summary, the evidence proves that the profit-sharing funds of the plaintiffs were taken by Mike Ames as trustee and placed on deposit at the State Bank. Then these same funds were transferred to InterFirst Bank in Beaumont and the funds were forthwith returned from InterFirst Bank to State Bank. These same monies were then placed in a new certificate of deposit in the name of Mike Ames, Trustee, in the amount of $254,000.00, the same amount that was previously transferred to InterFirst Bank.

Crucial Facts in the Record

In November Mike Ames opened a bank account in Heights Bank and did so by a check from Southwestern

Life Insurance Company in the amount of $424,888.35. The entire $424,888.35 was profit-sharing trust money. State Bank had notice of this fact. At that time, *Mike Ames told Sheffield that he, Ames, was the sole Trustee of the profit sharing plan, the trust fund pension plans, for Threaded Steel Products.* $254,000.00 of the $424,-888.35 was directly deposited into a checking account styled R. E., R. G., and R. L. Ames with Mike Ames, Trustee, as the signer. *Then $156,500.00 of the $424,-888.35 was used to purchase the certificate of deposit in the name of Threaded Steel Products Company Employees' Profit-Sharing Distribution account and $13,-741.00 was deposited into a checking account under the name of Threaded Steel Products Company Employees' Profit-Sharing Distribution Account. The $13,741.00 was subsequently distributed to a group of employees who were in the profit sharing plan of which the Bank had notice.* In January of '83 Mike Ames wired funds from the InterFirst Bank-Beaumont to State Bank through the First City Bank, Houston, in the amount of $157,895.02. At that time, Mike Ames purchased the CD in the amount of $254,000.00 in his name as Trustee. The Bank had notice that it was issued in the name of Mike Ames as Trustee. The Bank and its senior lending officer Sheffield had notice that Mike Ames was sole Trustee for the plan. The CD was in the total amount of $254,000.00 which in turn represented $157,895.02 plus an additional $100,-000.00 which Mike Ames, trustee, obtained from the bank less about $3,000 placed in a checking account. These facts were testified to by Mr. Sheffield. Then in the spring of '83, the Bank converted this CD to pay off the commercial loans. The banker admitted that the monies that were in the certificate of deposit had been

issued to the fiduciary trustee; but these monies were actually used to pay off commercial loans. A letter of credit in favor of Threaded Steel Products was also paid. Hence, the record clearly demonstrates the Bank utilized known profit-sharing trust funds belonging to employees to retire commercial loans to Threaded Steel. The banker further admitted that neither R. G. nor R. E. Ames had ever given any type or permission to use their trust fund pension benefits as collateral for commercial loans.

Mike Ames, Trustee, wrote a draft in the amount of $254,646.02 on account number 80-17565 payable to the order of the InterFirst Bank of Beaumont. The reason for the said check, stated on its face, was to purchase a certificate of deposit for R. E., R. G., R. M. and R. L. Ames' portion of the Threaded Steel Products profit-sharing plan. The State Bank had notice of this as clearly proved by Plaintiffs' Exhibit 10.

About two weeks later, on December 1, 1982, Mike Ames, together with an attorney as secretary and counsel for Threaded Steel, and R. L. Ames, vice-president of Threaded Steel, met as the Threaded Steel corporate board of directors. They adopted a corporate resolution giving Mike Ames individually [not as trustee] the authority from the corporation only—not from the beneficiaries of the plan—"to sign any and all checks, drafts, orders against any funds at any time standing in the credit of Threaded Steel and said bank, Heights State Bank, and/or against my account with Heights that an account shall be established in the name of this corporation with the Heights State Bank. That said Bank is hereby authorized to honor any and all checks so signed including those drawn to the individual order of such officer without further inquiry or regard to the authority of the

said officer to use such checks or the proceeds thereof or remain singly as authorized to borrow on behalf of this corporation from said Bank and to execute . . . for the repayment of any sums so borrowed, . . . and to pledge . . . as security . . . property . . . ." These resolutions *dealing with corporation funds as distinguished from Trustee funds were drawn on the forms submitted by the State Bank. The resolutions consistently speak of any property or funds that belonged to the corporation.* Mr. Sheffield testified that his bank required such a resolution and such a form be completed and *signed before a corporation placed its money* into an account with the Bank.

Even though the senior vice-president of State Bank testified that he had no dealings with Mike Ames between November 17, 1982 and January 20, 1983; nevertheless, there exists in the record a form provided by the Bank and the commercial lending department thereof, which was a corporate resolution. *This resolution did not pertain to the Profit-Sharing Plan in any manner.*

A Summary

In sum, the record is clear that Mike Ames first attempted to have dealings with the State Bank in September of 1982, contacting Mr. James E. Sheffield. Mr. Sheffield was a senior vice-president of Heights Bank in charge of commercial lending. A loan application was made and delivered in September of '82 by Mike Ames in behalf of Threaded Steel Products Company for the sum of $180,000.00. That loan request was refused. The reason for refusal was that Threaded Steel was in a poor, distressed financial condition. Threaded Steel accounting records reflected three consecutive years of heavy financial losses. Then on November 16, 1982, Mike Ames opened an

account with State Bank and *it is particularly salient and crucial that the account was opened with a check from Southwestern Life Insurance Company that represented the then total assets of the Threaded Steel Products profit-sharing plan.* The Bank knew this. This check was in the amount of $424,888.35. At that time Mike Ames told Mr. Sheffield that *Mike Ames was the sole trustee of the Threaded Steel profit-sharing plan which was also a type of pension plan for the Threaded Steel employees. Approximately $175,000.00 was disbursed to other eligible individuals as participant of the profit sharing plan.* The Bank knew of these facts.

In September of '82 when the first application for a loan was made, the banker recalled that the company was apparently heavily engaged in litigation. The banker unequivocally acknowledged that Mike Ames told him when the Southwestern Life Insurance Company check was deposited in Heights State Bank that Mike Ames was acting as the sole trustee of the profit-sharing plan of Threaded Steel Products. The only significant history that the State Bank had with Mike Ames was as a trustee and that he was the sole trustee for the profit sharing plan. Under the totality of the circumstances of the record it appears irrefutable that the bank had to realize the nature of the trusteeship of Mike Ames was as sole trustee for the profit-sharing plan.

The profit-sharing plan and its trust monies were flagrantly violated. For example, on February 3, 1983, $50,000 was advanced to Threaded Steel which was wired to InterFirst Bank of Beaumont and *the $50,000 was wired directly to the account of Threaded Steel Products, a corporation, at the InterFirst Bank.* Then on February

7, an additional $54,000 was wired. Shortly thereafter there was an additional letter of credit drawn in favor of a firm known as Alcan Metal Goods or Alcan Aluminum in the amount of forty-two thousand plus dollars. By July of '83 the Bank had fully converted the CD to pay the commercial loans and debts of Threaded Steel. The Bank unequivocally acknowledged through its chief commercial loan officer that the relevant CD was issued to Mike Ames as trustee. Sheffield was asked: "You are aware that some of the funds from Southwestern Life check that initially was deposited over here were wired to InterFirst and funds were wired back from InterFirst?" Sheffield's answer was an unequivocal "yes".

Sheffield acknowledged that the *corporate resolutions were for the benefit of the corporation.* It is clear that the corporate resolutions on the forms supplied by the State Bank did not empower the corporation or the Bank to use profit sharing trust funds as collateral or to be used as an offset for defaulted commercial loans to Threaded Steel Products.

There are simply no provisions in the corporate resolutions (which were unequivocally affirmed by Mr. Sheffield during cross examination) that conferred any authority or power at all for Mike Ames to use the profit sharing trust funds on behalf of the corporation to secure commercial loans. The Bank had notice of this. We find this: Questions by Mr. Almquist:

> "Q. Mr. Sheffield, turning back to the Corporate Resolution, can you refer to us—show us any place in that Corporate Resolution where they discuss what authority Mr. R. M. Ames [Mike] has with respect to the pension or profit sharing benefits?

"A. *There's none whatsoever.*

"Q. *None at all?*

"A. *Not in the Corporate Resolution. That refers to Threaded Steel Products, a corporate entity.*

"Q. *With respect to the Corporate Resolution, where does it say that Mike Ames can set up an account in the names of R. M. Ames, Trustee, or conduct activities in the name R. M. Ames, Trustee?*

"A. *I have no documentation to that effect, at least in this file.*

. . . .

"Q. *In fact, there are two (2) points there that it it says "R. M. Ames, Singly," doesn't it?*

"A. *No.*

"Q. *On the Corporate Resolution where they've typed in his name.*

"A. *R. M. Ames. R. M. Ames, what, Sr.?*

"Q. *Singly.*

"A. *Oh, singly.*

"Q. *S-i-n-g-l-y.*

"A. *Yes, I'm sorry.*

"Q. *That's the way it's typed in on two (2) places there; is that right?*

"A. *Yeah.*"

The banker stated that it was common to have proper documentation when dealing with trusts or with trustees. We also find this:

"Q. Let me look at one (1) other item over here. When Mr. Winchester was drawing this up here a

little while ago, he wrote down a figure of one fifty-seven (157). Actually, what we're talking about in money that came in was one five seven eight nine five "o" two (15789502); is that right?

"A. Let me go back and refer to that. That's correct.

"Q. Okay. And, to that, the bank put ninety-six thousand one "o" four ninety-eight (96,104.98); is that right?

"A. Uh-huh (yes), yeah.

"Q. So, when you got to this R. M. Ames, Trustee CD, the amount of the CD is two hundred and fifty-four thousand dollars ($254,000.00); is that right?

"A. That's correct.

"Q. *And, Mr. Sheffield, that is the same figure that went out of Heights State Bank on November 18th, 1982, isn't it, sir?*

"A. *Yes.*"

Thus because of the chronology of events, because of the similarity of the figures, because of the fact that Mike Ames acted as Trustee, because of the fact that the only trustee capacity which Mike Ames told the bank was his capacity as trustee for the pension and profit sharing plan, because of the shortness of the duration of the times involved in the chronology, we hold that the verdict of the jury is against the great weight and preponderance of the evidence.

A landmark, definitive case on the issue of the Bank's duty to the beneficiary of a trust in connection with the misbehavior of the fiduciary trustee is *United States Fidelity & Guaranty Company v. Adoue & Lobit,* 104 Tex. 379, 137 S.W. 648, *aff'd on reh.,* 104 Tex. 379, 138

S.W. 383 (1911). The Court wrote as follows, in relevant part:

> "But if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, or if it participates in the profits or fruits of the fraud, then it will be undoubtedly liable."

137 S.W. at 653.

The United States Court of Appeals for the Fifth Circuit applied Texas law in a diversity of citizenship case, in *South Central Livestock Dealers v. Security State Bank,* 551 F.2d 1346 (5th Cir. 1977), *modified on other grounds and aff'm on reh.* 614 F.2d 1056 (5th Cir. 1980). The Fifth Circuit wrote upon litigation involving out-of-state cattle investors who brought an action against a Texas bank on a claim of wrongful offset and tortious interference with contractual relations. The Fifth Circuit Court, in relevant part, wrote:

> "Texas has long held that if a bank knows that deposits by a debtor in his own name are in fact held by him in a fiduciary capacity, then the bank may not apply such funds to the individual indebtedness of the debtor."

551 F.2d at 1349. Indeed, in our case, the funds were constantly held in the name of the trustee.

The Appeal of R.M. (Mike) Ames, Trustee

Mike Ames appeals from the judgment against him. This judgment is in favor of R. E. and R. G. Ames. Generally, a trustee, in our jurisdiction, shall exercise the judgment, care and prudence that persons of ordinary

prudence, discretion and intelligence would exercise in the management of their own affairs when the said trustee is supervising and managing trust property. *See* TEX. PROP. CODE ANN. Sec. 113.056(a) Vernon 1984. Hornbook law establishes that a fiduciary relation exists between a trustee and the beneficiaries of his trust and such fiduciary relationship must not be breached or violated. In *Maykus v. First City Realty and Financial Corp.*, 518 S.W.2d 887, 892 (Tex. Civ. App.—Dallas 1974, no writ), the court wrote:

> "The actions of such a party must be judged not by the morals of the market place, but by 'the punctilio of an honor the most sensitive.' . . ."

The law of trusts is well settled that a trustee owes to his beneficiaries an unwavering duty of good faith, fair dealing, loyalty and fidelity over the affairs of the trust and its corpus. Certainly, a trustee is not permitted to commingle trust funds with either personal funds or corporation funds in order to obtain commercial loans from banks. *See Pershing v. Henry*, 236 S.W. 213 (Tex. Civ. App.—Amarillo 1921), *aff'd* 255 S.W. 382 (Tex. Comm'n App. 1923, judgmt adopted).

The record is clear that the Appellee, Mike Ames, was a personal trustee of the funds of the profit-sharing plan. *He was not a trustee of, or for, the corporation named Threaded Steel Products Company.* A trustee may not lend trust funds to himself or to an affiliate. TEX. PROP. CODE ANN. Sec. 113.052(a) (Vernon 1984). Nor may the trustee lend trust funds to the trustee's employer or to a director, officer or employee of the trustee. And, so long as a person acts as a trustee, that person has the obligations and duties of a fiduciary. *Maykus, supra. See*

4 A. Scott, *Law of Trusts,* Sec. 334, at 2644-48 (3rd Ed. 1967). *See Smith v. Bolin,* 153 Tex. 486, 271 S.W.2d 93 (1954). A trustee is definitely required to conduct himself, in his trustee affairs, with scrupulous good faith and fidelity when dealing with the interests of his beneficiary. It is equally imperative upon a trustee, in his dealings with the trust property, not to use the trust property, corpus or income in his own private business. The trustee must not make any incidental profits for himself, nor is he to acquire or obtain any pecuniary gain from his high, fiduciary position. This is true because the beneficiary is entitled to claim the advantages gained by the fiduciary relationship and to hold the trustee chargeable for losses occurring from the violation of the trustee's fiduciary duties. *Pershing v. Henry,* 236 S.W. 213 (Tex. Civ. App.—Amarillo 1921) *aff'd* 255 S.W.2d 382 (Tex. Comm'n App. 1923, judgmt adopted).

Moreover, if a trustee converts the trust fund or the trust corpus into a different form of property, either taking into himself the title or placing the title in a corporation, the trustee has breached and violated his trust. *Hand v. Errington,* 242 S.W. 722 (Tex. Comm'n App., Sec. A, 1922, judgmt adopted).

The chancery courts have adopted a well-settled principle of equity that, when a relationship of trustee and cestui que trust once arises, it pervades every transaction respecting the trust. *Hand v. Eddington, supra.*

Moreover, we perceive that the Appellants had and have the right to receive their share of the proceeds of the large check from Southwestern Life Insurance Company as long as the same were identifiable or traceable—as they were here—into the CD issued by the State Bank

and have that CD in the name of Mike Ames, trustee, impressed with their rights as cestuis que trust.

It should be noted that, when the attorney for the Appellants asked Mike Ames whether or not he, as Trustee, obtained a fidelity bond or surety bond when he took over the plan, Mike declined to answer the question. It was announced by Mike's attorney that Mike Ames would invoke the Fifth Amendment privilege against giving answers which might tend towards some sort of self-incrimination. The attorney for Mike Ames announced that he had so advised his client as to any questions pertaining to the operation of the plan or its administration during the period of time Mike Ames served as Trustee. Thereafter, the Trustee, Mike Ames refused to answer the questions on about 32 different occasions, with answers reading:

"A. I'm not going to answer the question."

Or, "I will not answer that question", or answers that were very similar in wording.

After a lengthy line of questions by the Appellants' attorney, which were certainly relevant and material, seeking important information, the Trustee was finally asked:

"Q. With respect to the questions that I have asked today that you refused to answer—and I think your attorney has cleared this up earlier, but just for the record—you are invoking your Fifth Amendment right as the basis for refusing to answer these questions?

"A. Yes."

Mike was also asked:

"A. Where are the funds of the Threaded Steel Products employees' profit sharing plan located at the preesnt time?

"A. I won't answer the question.

. . . .

"Q. Mr. Ames, you have consulted with your attorneys here. Have you decided to change your answers or to answer any of the questions that have been asked today?

"A. No."

The Effect and Requirements of Pool v. Ford Motor Co.

In *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986), the court wrote:

> "Our continuing review of courts of appeals decisions in which factual insufficiency points are discussed convinces us that the overwhelming majority of those opinions represent honest efforts by their scriveners to adhere to the guidelines of *In re King's Estate*. . . ."
>
> "In order that this court may in the future determine if a correct standard of review of factual insufficiency points has been utilized, courts of appeals, when reversing on insufficiency grounds, should, in their opinions, *detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust*. . . ."

In this opinion, we have attempted to follow the Supreme Court, in *Pool, supra;* and, hence, this opinion has been lengthy. Indeed, we have tried to set out, in detail, and by actual quotes from the record, the contrary evi-

dence that so greatly outweighs the evidence, if any probative evidence does exist, in support of the verdict below. The startling fact is that, right up the very end, the State Bank off-set ordinary, delinquent commercial loans, made as business loans, for the benefit of Threaded Steel. The Bank off-set those bad loans against funds standing in the name of a trustee and the exhibits clearly show this. The Bank knew the nature of the Trusteeship of Mike Ames, being the sole trustee of the profit-sharing plan and the nature of the funds as being profit-sharing funds belonging to the beneficiaries. Mike never told the bank differently. We decide, regardless of whether the bank could somehow attempt to claim it did not know exactly who the beneficiaries were, that that was no excuse to off-set an ordinary commercial loan made to Threaded Steel against trust fund monies held in the name of the trustee. From past dealings, the Bank had to know that there was no trustee for Threaded Steel and that Mike Ames was the sole trustee for the beneficiaries of the profit sharing plan and the pension plan.

One very startling fact is that the certificate of deposit with the State Bank, dated February 28, 1983, in the amount of $159,914.06 (Plaintiff's Exhibit No. 7), certified that the money was on account with the bank for the Threaded Steel Products Co., Employees Profit Sharing Disbursement Account and that certificate of deposit had a maturity date of March 30, 1983, and the certificate of deposit affirmatively showed R.M. Ames, as Trustee for the Employees Profit Sharing Disbursement Account. This $159,914.06 was disbursed to the employees of Threaded Steel.

When the banker was testifying about the $157,000, the very language of the questions and the very wording

of his answers makes it clear that he was talking about the same $157,000 that was transferred to InterFirst Bank of Beaumont and then retransferred to the State Bank.

In passing upon the issue of whether the verdict was against the great weight and preponderance of the evidence, under this record, it is necessary for us to examine, the actual wording used in the questions to and answers of the banker and the other witnesses. It is glaringly clear that the initial $157,895.02 fund was definitely a portion of the profit sharing and pension plan. Under this record, it can be definitely deduced that the $157,895.02 was part of the amount that was taken out of the profit sharing plan in the Heights State Bank in Houston, and wired to the InterFirst Bank of Beaumont, and, within a short time, this amount of money was by wire retransferred to the Heights State Bank. This money was put in a certificate of deposit in the name of R. M. "Mike" Ames, Trustee. The Heights State Bank had to know that, at least $157,-895.02, was sacred trust funds. It must be borne in mind that the banker admitted that, out of the $424,888.35, a sum of $156,500 was used to purchase an original certificate of deposit in the name of the Employees Profit Sharing Distribution Account. Certainly the language and wording of the questions and answers, indicate that the banker agreed and knew that the $157,895.02 was money that was transferred back and had its origin in the $254,-000 certificate of deposit which was marked and definitely identified as part of the Profit Sharing Plan. Indeed, Heights State Bank makes this unequivocal statement, in its brief:

> "The Appellants somehow want the Court to infer that the funds in C.D. 28793 belong to the Appellants because there had been an earlier certificate

> of deposit in the same amount, which apparently did belong to a profit-sharing plan. . . ."

We think such an "inference" is altogether syllogistic. It is, indeed, inescapable. We decide these facts are more than an inference.

The Jurisdictional Issue

We further hold that the federal statute which specifically governs the pension and profit-sharing plans, being 29 U.S.C. Secs. 1132, et seq. (1985 & Supp. 1988), especially provides that a participant in the plan has the election to bring his action in the state court to recover his benefits due to him under the terms of his plan. 29 U.S.C. Sec. 1132(a)(1)(B) (1985). 29 U.S.C. Sec. 1132(e) (1985) specifically provides:

> "State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsections (a)(1)(B) of this section."

And Sec. 1132(a)(1)(B) provides that a civil action may be brought by a participant or beneficiary to recover benefits under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan. Hence, the federal law specifically mandates that state courts "shall have concurrent jurisdiction". This language is clear and unambiguous. We sanguinely overrule the contention and point of error of Mike Ames that the state court did not have competent jurisdiction to try this litigation.

The sole basis of the appeal in the brief of R. M. "Mike" Ames, the Trustee, is based on the contention that the state district court did not have jurisdiction

either before trial, after the receipt of evidence, or after the verdict was returned. Under the pleadings of R.E. Ames and R.G. Ames, and under the record, these participants and beneficiaries of the plan were certainly trying to recover benefits due to them under the terms of the plan as well as to enforce their rights under the terms of the plan. 29 U.S.C. Sec. 1132(a)(1)(B) (1985).

Generally, the ERISA preempts any state law which *attempts to directly regulate or moderate the contents or operations of the plan.* However, if a cause of action is brought in state court to enforce the terms and to enforce and recover the benefits of a retirement plan or a profit-sharing plan, such an action shall not be deemed to be preempted by ERISA. *Lukus v. Westinghouse Elec. Corp.*, Pa. Super., 419 A.2d 431 (1980).

The trustee, Mike Ames concedes in his brief that Section 1132(a)(1)(B) encompasses actions for the violations of terms of a profit-sharing benefit plan, citing *Sams v. N.L. Industries, Inc.*, 735 S.W.2d 486 (Tex. App.—Houston [1st Dist.] 1987, no writ). Here the Appellants R. E. and R. G. Ames are *asserting their rights under the plan. See Odgen v. Michigan Bell Tel. Co.*, 595 F.Supp. 961, 966 (E.D. Mich. 1984). Trustee Mike Ames also concedes that actions under Subsection (a)(1)(B) recognizes suits to recover benefits under a plan.

It should be borne in mind that, in Plaintiffs' Second Amended Petition, the live, trial pleading, R. E. Ames and R. G. Ames pleaded that *the plan had been terminated and that the Plaintiffs, in their Second Amended Petition, pleaded for their monies which had been converted and that R. M. "Mike" Ames, as well as the Heights*

State Bank, were guilty of the tort of conversion and, in so doing, Mike Ames had acted with malice or gross negligence. By pleading the tort of conversion, as done here, we perceive that that was an additional cause of action or trial allegation, giving the State trial court the jurisdiction.

We determine that the appeal taken by Mike Ames was for delay and without sufficient cause. We award R. E. Ames an additional five (5) percent of the amount of the jury verdict in his favor. We award R. G. Ames an additional five (5) percent of the amount of the jury verdict in his favor. Furthermore, we award an additional five (5) percent of the punitive damages. The interest on these additional awards pursuant to TEX. R. APP. P. 84 will begin to run from the date of this Opinion and thereafter until paid.

Query: What disposition should a Court of Appeals order under this record?

We feel constrained, and, indeed, we are constrained, to follow the very recent case of *Cropper v. Caterpillar Tractor Company,* 31 Tex. Sup. Ct. J. 459 (May 25, 1988), delivered by Justice James P. Wallace.

Justice Wallace wrote:

> ". . . [W]e decide whether a court of appeals has the authority to remand a cause for a new trial when it concludes that a jury's failure to find in favor of a party on a particular issue is 'against the great weight and preponderance of the evidence.' We hold that a court of appeals has the authority to review a 'failure to find' in the same manner in which it may review a jury's findings. TEX. CONST., art. V, Sec. 6. We further hold that this review does not

violate the right of trial by jury. TEX. CONST., art. I, Sec. 15.

. . . .

"The jury answered all issues favorably to Cropper, including the following defensive issue submitted at Caterpillar's request:

"Was ANTHONY CROPPER Negligent in the operation of the Water Wagon on the occasion in question?

"ANSWER: No."

Quoting further, at page 459:

"The Texas Constitution confers upon the court of appeals 'appellate jurisdiction . . . under such restrictions and regulations as may be prescribed by law,' and further provides that 'the decision of said courts shall be conclusive upon all questions of fact brought before them by appeal or error.' TEX. CONST. art. V, sec. 6. These two clauses have independent significance, and have quite different consequences upon the allocation of jurisdiction between this court and the intermediate appellate courts. . . . The latter, which will be referred to as the 'factual conclusivity clause,' functions not as a grant of authority to the courts of appeals but as a limitation upon the judicial authority of this court. *Choate v. San Antonio & A.P. Ry. Co.*, 44 S.W. 69 (Tex. 1898)."

Quoting further, at page 460:

"II.

"The authority of the courts of appeal to review a 'non-finding.'

"In *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986), the court recently intimated in *dicta*

> that there might be some distinction between view of findings and non-findings. While recognizing that the constitution empowers courts to 'unfind' a jury's findings, the court observed that it was 'more difficult to rationalize' why a non-finding should be reviewable under a great weight and preponderance standard. 715 S.W.2d at 634. This difference between findings and non-findings had previously been described as a 'distinction which exists in semantics and theory only but which does not exist in reality.' *Dyson v. Olin Corp.*, 692 S.W.2d 456, 458 (Tex. 1985) (Robertson, J., concurring). If there is any inference in *Pool* that there is a distinction between review of findings and review of non-findings, we lay that question to rest."

Hence, we follow *Cropper, supra; Herbert v. Herbert,* 31 Tex. Sup. Ct. J. 453 (May 25, 1988), being No. C-4986, opinion by Justice Kilgarlin, and *Pool v. Ford Motor Co., supra.*

Thus, we reverse the judgment in favor of the bank against R.E. and R.G. Ames and remand that cause of action for a new trial on the whole merits of the case. We order that this reversal of that part of the judgment below, and this remand, is severed from the remainder of this appeal. We concede that the recitation of the facts and the narratives from the record in this opinion have been somewhat lengthy. We maintain that this was necessary because of the directives contained in *Pool v. Ford Motor Co., supra.* The Supreme Court's opinion speaks of a jury's finding, but *Cropper, supra,* makes it clear that the same standard of review should be applied to a non-finding.

Further, the Supreme Court wrote that the Courts of Appeal, in their opinions, should state in what regard

the contrary evidence greatly outweighs the evidence in support of the verdict. We have followed this directive. *See* Calvert, *" 'No Evidence' and 'Insufficient Evidence' Points of Error"*, 38 TEX. L. REV. 361 (1960).

We find virtually no evidence of significant probative value that supports the verdict as to the Bank. It is correct that the loan officer did, on the stand testify somewhat differently from the testimony that he gave in his deposition.

Having severed part of this appeal as to the State Bank, we affirm the judgment in favor of R. E. Ames and R. G. Ames against R. M. "Mike" Ames, adding the five (5) percent as set out above pursuant to TEX. R. APP. P. 84.

AFFIRMED IN PART AND REFORMED, with the Affirmance being severed from the balance of the Appeal; REVERSED IN PART AND REMANDED, with the Reversed part remanded for a new trial.

JACK BROOKSHIRE
Justice

Opinion delivered.
August 25, 1988.
Publish

CONCURRING AND DISSENTING OPINION

I concur in the substantive result of the case, but respectfully dissent to the imposition of a five percent penalty under TEX. R. APP. P. 84.

The majority finds that the appeal was brought "for delay and without sufficient cause." I do not believe the jurisdictional question had been fully resolved by our Texas courts, and in fact, the trial judge must also have been of that opinion when he stated:

> THE COURT: Counsel, I don't intend to cut you short. I'm going to overrule the Defendant, Mike Ames' Motion for Instructed Verdict. With regard to this Motion to Dismiss in a written Motion, I have not gone and read these cases, this multitude of cases that you've cited in this thing. But, just for the record, and this is worth zero, I think it's absolutely ridiculous that this question appears to be so unclear, even to federal courts, as to what state courts can and cannot do. And, the matter to me, and this may be a serious oversimplification of the problem, is that they probably need to state that state courts cannot hear any matter regarding Employee Retirement Income Security Act cases, period. But, I don't know whether I have jurisdiction or not. I just want to state that for posterity. I don't think I'll ever know. I'm going to overrule the Motion to Dismiss it, and we'll see what they have to say about this case. We'll give them another one to write on.

Appellant should not now be penalized when the trial court invited, in a manner of speaking, appellate review.

Therefore, I respectfully dissent to the imposition of the penalty.

DON BURGESS
Justice

Dissent Delivered
August 25, 1988
Publish

APPENDIX B

IN THE SUPREME COURT OF TEXAS

NO. C-8024

ROGER MICHAEL AMES AND
HEIGHTS STATE BANK
Petitioners

v.

R. E. AMES AND R.G. AMES,
Respondents

FROM JEFFERSON COUNTY
NINTH DISTRICT

This case involves a suit for conversion of profit-sharing funds brought by beneficiaries of an employee benefits plan against the trustee and a third-party bank. After the plan was terminated, R.E. and R.G. Ames, employee members of a profit-sharing plan at Threaded Steel Products Company (Threaded Steel), sue the sole trustee of the plan, Roger Michael Ames (Mike) and Heights State Bank, now known as NBC Bank, Houston - N.A., claiming the two wrongfully converted their benefits from the plan. After a jury trial, the trial court rendered a judgment against Mike, awarding actual and punitive damages.[1] A take-nothing judgment was rendered against

1. The trial court ordered that R.E. Ames recover $242,161.40 and R.G. Ames recover $94,501 in actual damages. Further, it was ordered that both R.E. and R.G. jointly recover $10,000 in punitive damages.

Heights State Bank. The court of appeals affirmed and reformed the trial court judgment in part and awarded R.E. and R.G. an additional five percent penalty because it concluded that the appeal was brought for delay and without sufficient cause. 757 S.W.2d 468. Further, the court of appeals reversed and remanded the cause of action against Heights State Bank. We modify the court of appeals' judgment to eliminate the five percent penalty and in all other respects affirm the judgment.

THE FACTS

Threaded Steel was a family owned corporation whose officers and shareholders included three brothers, R.E., R.G., and Mike Ames. Mike was the chairman and chief executive officer at all times pertinent to this controversy. He was also the sole trustee of the company's pension and profit-sharing plan which commenced in the early 1970's. The plan had been organized pursuant to the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1985). The administrator of the plan was Southwestern Life Insurance Company (Southwestern Life), who is not a party to this lawsuit.

In September 1982, Mike Ames, on behalf of Threaded Steel, applied for a loan in the amount of $180,000 from Heights State Bank. The loan was declined because of the questionable financial condition of Threaded Steel. The company had suffered financial losses from 1977 through 1981.

In November 1982, steps were taken to terminate the profit-sharing plan because Threaded Steel was unable financially to contribute to the plan. Mike, as trustee, received a check in the amount of $424,888.35 from

Southwestern Life which represented all of the profit-sharing trust fund. Mike deposited these funds at Heights State Bank in the following manner:

(1) $254,646.72 in a checking account styled R.E., R.G., R.L., and R.M. Ames, with Mike as the trustee and signor.

(2) $156,500 in a certificate of deposit (CD) in the name of the profit-sharing plan.

(3) $13,741.63 in a checking account in the name of the profit-sharing plan.

Without his brothers' knowledge or consent, Mike drew a check in the amount of $254,000 against the Ames brothers' account ((1) above) payable to Interfirst Bank of Beaumont (Interfirst). The legend on the check stated "CD for R.E., R.G., R.M., R.L.[2] portion of TSP ("Threaded Steel Products) Profit Share Plan." It is these funds which are the subject of this controversy. Upon termination of the plan, the remainder of the funds were disbursed to the other plan beneficiaries, all of whom were nonmembers of the Ames family.

After the transfer was made to Interfirst, $157,895.02 was transferred back by wire to Heights State Bank.[3] This money, plus an additional sum borrowed from Heights State Bank, was used to purchase a CD in the amount of $254,000. This CD was later pledged as collateral for commercial loans from Heights State Bank to

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2. R.L. Ames, also a brother, was not a party to the lawsuit against Mike and Heights State Bank.

3. The record does not reflect what disposition was made of the excess of the funds originally transferred to Interfirst over the amount transferred back to Heights State Bank. Mike did not testify at trial, asserting his constitutional privilege against self-incrimination.

Threaded Steel. Threaded Steel failed to repay the loans when they became due, consequently, the bank offset the CD against the amounts owing.

R.E. and R.G. brought suit in state district court against Mike and Heights State Bank alleging breach of fiduciary duty and conversion of their profit-sharing funds. The case was submitted to the jury under a state common law conversion theory. The jury found that Mike had converted the funds but failed to find that the CD in question contained any profit-sharing plan monies belonging to R.E. or R.G. The trial court rendered a judgment for R.E. and R.G. against Mike and rendered a take-nothing judgment against the bank. The court of appeals affirmed the judgment as to R.E. and R.G. but reversed and remanded the take-nothing judgment against the bank to the trial court. Both Mike and the bank filed applications for writ of error before this court.

APPLICABILITY OF ERISA

Mike contends that under the provisions of ERISA the state court lacks subject matter jurisdiction. He asserts that even if the state court exercised concurrent jurisdiction, the action would be preempted by ERISA.

Subject matter jurisdiction over controversies involving profit-sharing plans under ERISA is provided for in 29 U.S.C. § 1132(e)(1) (1985), which reads:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Subsection (a)(1)(B) provides that a civil action may be brought by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (1985).

The facts present a novel issue: whether the provisions of ERISA continue to control after a plan is terminated and funds are distributed to some beneficiaries but the funds of two other beneficiaries are converted by the plan trustee? It is undisputed in the record that the Threaded Steel employees profit-sharing plan had been terminated prior to the deposit of R.E.'s and R.G.'s benefits into a CD at Heights State Bank. Mike distributed plan benefits to other employees, but he did not distribute R.E.'s or R.G.'s benefits to them. Instead, he placed their plan benefits in a separate account bearing his name as trustee.

The funds, which the jury found that Mike had wrongfully converted to his own use, were distributed from the plan after its termination. When he failed to distribute the benefits owed his brothers, he breached the fiduciary duty owed them under state common law and not under ERISA. The provisions of ERISA no longer governed his actions.[4]

The record shows that R.E. and R.G., as participants and beneficiaries of the plan, sought to recover benefits

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4. Recently, in *Mead Corp. v. Tilley*, _____U.S._____, 109 S.Ct. 2156 (1989), the United States Supreme Court applied ERISA to a case involving misconduct of a plan trustee which occurred during termination of a benefit plan. However, the instant case is distinguishable from *Tilley* because R.E. and R.G. sued for misconduct which occurred after termination of the plan was completed.

owed them under the plan. Their cause of action arose out of the failure or refusal of the trustee of a terminated plan to convey benefits, not the violation of fiduciary duty created by ERISA in the continuing administration of a retirement plan. Given these circumstances, the state court properly exercised jurisdiction.

Preemption under ERISA is governed by 29 U.S.C. § 1144(a) (1985) which reads:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

The rationale for federal preemption of state remedies and causes of action covered by ERISA is so that trustees of plans will not be subject to the threat of conflicting and inconsistent federal and state regulations. *Hoffman v. Chandler*, 431 So.2d 499 (Ala. 1983); *Smith v. Crowder Jr. Co.*, 280 Pa. Super. 626, 421 A.2d 1107 (1980). Generally, ERISA preempts any state law which regulates the content or operation of the plan. Therefore, the question is whether R.E.'s and R.G.'s lawsuit "relates to" the profit-sharing plan in such a way that it is an attempt to regulate areas explicitly governed by ERISA or whether it only indirectly relates to the plan so that it does not conflict with the purpose of ERISA. *Shaw v. Westinghouse Elec. Corp.*, 276 Pa. Super. 220, 419 A.2d 175 (1980). *Lukus v. Westinghouse Elec. Corp.*, 276 Pa. Super. 232, 419 A.2d 431 (1980).

R.E. and R.G. sought to recover benefits due them under the plan after its termination. Their claims were directed at recovery of benefits under the terms of the plan and did not involve regulation of the plan. They instituted a lawsuit under Texas common law for recovery of their benefits which Mike had converted. Since the plan had terminated, we are not faced with interpreting the terms or conditions of the plan. Hence, the lawsuit did not "relate to" the employee benefit plan within the meaning of 29 U.S.C. § 1144(a) (1985).

Because we have concluded that ERISA does not apply and that if applicable the state court would have concurrent jurisdiction, we hold that the state court properly exercised jurisdiction over the action.

THE BANK'S APPLICATION

Heights State Bank contends that the court of appeals erred in holding that the jury's negative finding on the bank's liability issue was against the great weight and preponderance of the evidence. Briefly, the facts which pertain to the bank are as follows. Mike deposited profit-sharing funds in the bank, some of which were placed into an account styled R.E., R.G., R.L., and R.M. Ames, with Mike indicated as trustee. A check in the amount of $254,000 was then drawn against this account by Mike and transferred to Interfirst. Then, $157,895.02 was transferred from the Interfirst account back to Heights State Bank. This sum, plus additional money borrowed by Threaded Steel was used to purchase a CD in the amount of $254,000. The CD was pledged as collateral to Heights State Bank for loans made to Threaded Steel. When the company failed to repay the loans, the bank offset the CD against the overdue notes.

R.E. and R.G. sued Mike as well as Heights State Bank for conversion of the profit-sharing funds. Based on the jury verdict, the trial court rendered a take-nothing judgment in favor of the bank. Specifically, the jury answered "no" to the following question:

Question No. 8

> Do you find from a preponderance of the evidence that Heights State Bank Certificate No. 28793 contains profit sharing plan monies belonging to R.G. Ames and R.E. Ames?

The court of appeals held that the jury's negative finding of this issue inquiring about the offset CD was against the great weight and preponderance of the evidence. Further, the court of appeals held that the bank's officer knew or should have known that the funds on deposit in the CD were profit-sharing trust funds. The issue regarding the bank's knowledge was unanswered as it was predicated on an affirmative finding of Question No. 8.

Heights State Bank claims that the court of appeals failed to recognize the demarcation between the function of the jury and appellate courts, and in so doing it usurped the function of the jury. The court of appeals had the task of determining whether the jury's negative answer to Question No. 8 was against the great weight and preponderance of the evidence. In its determination, the bank claims the court of appeals utilized an incorrect test.

A court of appeals may reverse and remand a case for new trial if it concludes that the jury's "failure to find" is against the great weight and preponderance of the evidence. *Cropper v. Caterpillar Tractor Co.*, 754 S.W.

2d 646, 651 (Tex. 1988). The Texas Constitution provides that the decisions of appellate courts "shall be conclusive on all questions of fact brought before them on appeal or error." Tex. Const. art. V, § b. This constitutional provision not only grants authority to the courts of appeals but limits the judicial authority of this court. *Cropper*, 754 S.W.2d at 648. Therefore, in our review of the court of appeals' holding that the jury's answer is against the great weight and preponderance of the evidence, we do not have jurisdiction to weigh the evidence. We do, however, have jurisdiction to determine whether or not the court of appeals applied the correct standard in reaching its decision.

In *Pool v. Ford Motor Co.*, 751 S.W.2d 629, 635 (Tex. 1986) the court set out a requirement which courts of appeals must follow in reversing on factual insufficiency or great weight grounds. The court stated that the courts of appeals

> should in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust . . . . Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.

Id. In this context, the court of appeals in the instant case went to great lengths in its attempt to follow *Pool*. It set out in detail and by actual quotes from the record the contrary evidence that it determined so greatly outweighed the evidence in support of the verdict. The court of appeals therefore performed its function in reviewing

the evidence. Heights State Bank has offered another rendition of the facts in an attempt to convince us that the court of appeals' factual determination was incorrect. As previously discussed, we have no jurisdiction to make such determination.

CONCLUSION

We modify the court of appeals' judgment to eliminate the five percent penalty and in all other respects affirm the judgment. The state court properly exercised jurisdiction over the cause of action and the court of appeals correctly applied the standard mandated by this court in *Pool.*

/s/ OSCAR H. MAUZY
Oscar H. Mauzy
Justice

OPINION DELIVERED: July 12, 1989.

Concurring and dissenting opinion by Justice Gonzalez joined by Justice Cook.

IN THE SUPREME COURT OF TEXAS

NO. C-8024

ROGER MICHAEL AMES AND
HEIGHTS STATE BANK,
Petitioners

v.

R.E. AMES AND R.G. AMES,
Respondents

FROM JEFFERSON COUNTY
NINTH DISTRICT

CONCURRING AND DISSENTING OPINION

I agree with the court's disposition regarding the cause of action against Heights State Bank. However, I disagree that a trustee of a pension and profit-sharing plan organized pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1985), can wiggle out from under federal jurisdiction and/or from the application of federal law by merely terminating the plan before he or she absconds with the funds. To allow this to happen, as the court has done in this case, frustrates the intent of Congress to provide stability and uniformity in this area of the law. Thus, I would reverse that portion of the court of appeals' judgment which affirms the trial court's judgment and dismiss the cause as to Roger Michael Ames (Mike).

This case involves a suit for conversion and breach of fiduciary duty brought by beneficiaries of a pension

and profit-sharing plan against the trustee of the plan and a third-party bank. R.E. and R.G. Ames were employees of Threaded Steel Products Company (Threaded Steel) and were members of its profit-sharing plan. Their brother, Mike, also an employee and member of the plan, was the sole trustee of the plan. R.E. and R.G. sued Mike after the plan was dissolved, claiming that he did not perform his fiduciary duties and that he and Heights State Bank converted plan benefits.

JURISDICTION

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). As a remedial statute, ERISA provides for federal causes of action for recovery of benefits due under pension and welfare plans and for breach of fiduciary duty by plan beneficiaries. 29 U.S.C. §§ 1109, 1132(a)(1)(B) (1985). Jurisdiction over matters involving profit-sharing plans under ERISA is provided in 29 U.S.C. § 1132(e)(1) (1985) which reads:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Subsection (a)(1)(B) provides:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—

> (B) to recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

It was Congress' intent to establish an inclusive statutory scheme to regulate employee benefit plans and to provide stability and uniformity in this area. *See* 29 U.S.C. §§ 1001(a), (b) (1985). To ensure this goal, ERISA has a preemption clause which provides that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." *Id.* § 1144(a).[1] For purposes of this provision, "state law" includes a state's decisional law. *Light v. Blue Cross & Blue Shield of Alabama, Inc.*, 790 F.2d 1247, 1249 (5th Cir. 1986); 29 U.S.C. § 1144(c)(1) (1985). *See aiso Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). This provision, as interpreted by the United States Supreme Court, demonstrates Congress' intent "to establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

In the instant case, Mike claims that pursuant to ERISA the cause of action asserted against him is not within the state court system's jurisdiction and should therefore be dismissed. Alternatively, Mike contends that even if the action against him is for recovery of benefits, which would give state courts concurrent jurisdiction under 29 U.S.C. § 1132(a)(1)(B), the action is nontheless preempted by ERISA and should therefore be dismissed since it was tried on state common law and statutory grounds.

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1. State laws which regulate banking, insurance, or securities are exempt from this preemption provision. 29 U.S.C. § 1144(b)(2)(A) (1985).

In order for state courts to have subject matter jurisdiction to consider the action against Mike, it must be determined to be an action by plan participants seeking to recover or clarify rights to benefits "under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (1985). While Mike contends the action against him is for breach of fiduciary duty, R.E. and R.G. claim their suit is for recovery of benefits under the pension and profit-sharing plan which had been terminated. Hence, R.E. and R.G. claim that not only do Texas courts have jurisdiction over their suit, but that it is not preempted by ERISA as the action is only incidently or tangentially related to a benefit plan which is no longer in existence.

The case was pleaded and submitted to the jury on the theory of conversion. The instructions and special issues dealt only with conversion under state common law and the power a trustee has in transferring trust funds under state statutory law. Hence, the issue in this case at the trial court level was not whether R.E. and R.G. were contractually entitled to benefits under the terms of the plan. It is undisputed that the Ames brothers are due benefits under the terms of the plan. The claims asserted involve *conversion of plan benefits* and thus it is my view that R.E. and R.G. place at issue the propriety of certain *conduct by Mike as trustee and call for construction and application of the standards of conduct established by ERISA*.

Section 1104 of ERISA provides for certain duties owed by fiduciaries to plan beneficiaries. By allegedly having taken the benefits due the Ames brothers and having pledged them to secure loans for Threaded Steel, Mike allegedly violated express provisions of section 1104(a)(1) which provide that "a fiduciary shall dis-

charge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." Undoubtedly, conversion of plan benefits by a trustee constitutes a breach of fiduciary obligations under ERISA. Therefore, the action against Mike, however labeled, is in actuality a claim for breach of fiduciary duty and should not be considered as a claim for plan benefits conferring Texas state courts with subject matter jurisdiction.

In reaching this conclusion, I would restrictively interpret the phrase "under the terms of the plan" in 29 U.S.C. § 1132(a)(1)(B) to mean state court jurisdiction is limited to suits solely involving application or construction of the terms of the plan in determining whether a participant or beneficiary is entitled to benefits *as a matter of contract law*. This interpretation is in keeping with holdings of a majority of courts which have addressed this issue. *See, e.g., Menhorn v. Firestone Tire & Rubber Co.,* 738 F.2d 1496, 1500 n.2 (9th Cir. 1984); *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Sec. Life Ins. Co.,* 600 F.2d 671, 676 (7th Cir. 1979); *Morrissey v. Curran,* 567 F.2d 546, 549 (2d Cir. 1977); *Lembo v. Texaco, Inc.,* 194 Cal. App. 3d 531, 538, 239 Cal. Rptr. 596, 600 (1987); *Young v. Sheet Metal Workers' Int'l Ass'n,* 112 Misc. 2d 692, 698-699, 447 N.Y.S.2d 798, 803 (N.Y. Sup. Ct. 1981); *Goldberg v. Caplan,* 277 Pa. Super. 47, 54, 419 A.2d 653, 657 (1980); *Duffy v. Brannen,* 529 A.2d 643, 651 (Vt. 1987). *But see Hoffman v. Chandler,* 431 So.2d 499 (Ala. 1983).

PREEMPTION

Even if the claims asserted against Mike are within

the state courts' jurisdiction, I believe that they would be preempted by the express provision of ERISA which provides that the Act preempts all state laws as far as they relate to employee benefit plans. 29 U.S.C. § 1144(a). *See generally* Bishop & Denney, *Hello ERISA, Good-bye Bad Faith: Federal Pre-emption of DTPA, Insurance Code, and Common Law Bad Faith Claims,* 41 Baylor L. Rev. 267 (1989). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw,* 463 U.S. at 96-97. Therefore, even if the suit against Mike was considered to be a contract action to recover plan benefits, it would fall directly under ERISA's preemptive provision. *Metropolitan Life Ins. Co. v. Taylor,* ____U.S.____, 107 S. Ct. 1542, 1546 (1987). Further, it has consistently been held that because of the broad goals of Congress in enacting ERISA, the Act preempts state common law causes of action that do not expressly concern pension plans. *See Alessi,* 451 U.S. at 424. Hence, ERISA's pre-emptive effect over state law claims "depends on the conduct to which such law is applied, not on the form or label of the law." *E-Systems, Inc. v. Taylor,* 744 S.W. 2d 956, 959 (Tex. App.—Dallas 1988, writ denied) (citing *Scott v. Gulf Oil Corp.,* 754 F.2d 1499, 1504 (9th Cir. 1985)). *See also Gorman v. Life Ins. Co. of North America,* 752 S.W.2d 710, 714 (Tex. App.—Houston [1st Dist.] 1988, writ requested); *Sams v. N.L. Indus., Inc.,* 735 S.W.2d 486, 489 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Giles v. TI Employees Pension Plan,* 715 S.W.2d 58, 59 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

At trial, the jury affirmatively answered a special issue which asked if Mike converted the funds due R.E. and R.G. under the Threaded Steel profit-sharing plan. Thus,

I believe that it is clear that although the common law cause of action of conversion does not regulate pension plans, *the conduct relied on by the Ames brothers to establish their claim pertains to proper handling of plan funds.*

CONCLUSION

In my view, the court has erroneously placed emphasis on the fact that the plan was terminated. R.E. and R.G. claimed in their pleadings and through testimony that Mike did not perform his duties as trustee and fiduciary of the plan. This claim specifically places Mike's conduct with respect to the plan itself at issue. Therefore, applicability of ERISA is unavoidable. Moreover, as a practical matter, it is unwise to hold that Mike is no longer subject to ERISA's standards simply because the plan was terminated. If this were Congress' intent, it would behoove a plan fiduciary to avoid the application and consequences of ERISA violations by terminating the plan before committing fraud or other breaches of fiduciary duty. I believe the better view dictates that ERISA governs both pre- and post-termination conduct by plan fiduciaries as it relates to profit-sharing funds. *See Mead Corp. v. Tilley*, ____U.S.____, 109 S. Ct. 2156 (1989) (termination of the plan did not remove the action from the confines of ERISA).

For the above reasons, I dissent.

/s/ RAUL A. GONZALEZ
Raul A. Gonzalez
Justice

OPINION DELIVERED: July 12, 1989

Justice Cook joins in this opinion.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2192

GAILE HENRY, SR.,
Plaintiff-Appellant,

versus

BEAUMONT IRON & METAL CORP., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas
(CA-B-87-0503)

(January 18, 1989)

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:*

The summary judgment in favor of the defendants is affirmed because, as the district court said in its order

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of February 25, 1988, the Profit Sharing Plan was terminated and full distribution of plaintiff's benefits was made to him in 1986. Plaintiff's attorney agreed to the termination of the plan in November and to the trustee bank's delivery on December 31 of checks payable to plaintiff, to be held by S. L. Greenberg. This delivery was made in order to ensure that plaintiff would be deemed to have received this distribution in 1986 for income purposes.

Prior to 1987 there is no evidence that any defendant breached a fiduciary duty owed to plaintiff under ERISA or the plan. The bank acted only as was authorized by plaintiff. Plaintiff on January 6, 1987 agreed to the court's order under which the $200,000 was to be deposited and to be subject to subsequent court judgment. That election by plaintiff and the court's subsequent judgment cannot be undone by the present suit, because the $200,000 was not protected by ERISA on January 6, 1987, and could not be said to have been wrongfully attached.

AFFIRMED.